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FILED
OCT 30 1959
JAMES R. BROWNING, Clerk

No. 507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

RICHARD A. MACK and THURMAN A. WHITESIDE,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Richard A. Mack and Thurman A. Whiteside pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cases on September 29, 1959.

OPINIONS BELOW

The United States District Court for the District of Columbia did not render an opinion when it denied the petitioners' motions for judgment of acquittal.

The memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit accompanying its order docketing and dismissing these appeals has not yet been reported, and a copy of that memorandum opinion is printed in Appendix B hereto, *infra*, p. 3a.

JURISDICTION

The orders of the Court of Appeals docketing and dismissing these appeals were entered on September 29, 1959. A petition for rehearing en banc was denied on October 22, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an order denying a motion for a judgment of acquittal is appealable as a "final decision" within the meaning of 28 U.S.C. § 1291 (1952) where the order was entered after a trial in which the evidence was not sufficient to sustain a guilty verdict, and the jury was discharged without having reached a verdict.

CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, Section 1291 of Title 28 of the United States Code, and Rule 29 of the Federal Rules of Criminal Procedure. They are printed in Appendix A, *infra*, pp. 1a-2a.

STATEMENT

The petitioners were tried in the court below on an indictment charging them jointly with violation of 18 U.S.C. § 371 (Conspiracy) and individually with violation of 18 U.S.C. § 1505 (Influencing or Injuring

Witness Before Agencies or Committees). The following statement of the case is made solely for the purpose of presenting to this Court those features of the trial below which are necessary to its consideration of the legal issues raised by the action of the Court of Appeals in dismissing their appeals.

At the close of all the evidence for both sides in the fourteen-week trial below, the petitioners each filed a motion for judgment of acquittal under Rule 29 (a) of the Federal Rules of Criminal Procedure. The ground assigned for these motions was the insufficiency of the evidence presented by the Government to sustain a guilty verdict. The trial court, exercising a prerogative granted it by the first sentence of Rule 29 (b), reserved decision on the motion and submitted the case to the jury. When, after some three and one-half days of actual deliberation, the jury had not reached a verdict, the court ordered it discharged. Later, the court denied the petitioners' motions for judgment of acquittal on which it had previously reserved its decison. From the order denying these motions, the petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit. On the motion of the Government, that court entered an order dismissing these appeals on the ground that they were not taken from a "final decision" as required by 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted in this case because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court and because it has decided this question in a way in conflict with applicable

decisions of this Court defining the relationship between the doctrine of finality and the erroneous denial of the constitutional rights of an accused, and most especially in conflict with the rationale of *Stack* v. *Boyle*, 342 U.S. 1 (1951).

Prior to this year no federal court had passed on the question of whether a defendant could immediately raise on appeal the sufficiency of the Government's evidence to sustain his conviction where his trial had resulted in a hung jury. During this year, however, two of the circuits have been called on to decide this question. In *Gilmore* v. *United States*, 264 F. 2d 44 (C.A. 5 1959), cert. den. 359 U.S. 994 (1959), the Fifth Circuit held that the jury's disagreement prevented the "final decision" necessary for appellate review under 28 U.S.C. § 1291. In the instant case the Court of Appeals for the District of Columbia Circuit has taken a similar view. It is to be anticipated that it will be only a matter of time until this same question is presented to the other courts of appeals, because this question of finality arises in virtually every criminal case eventuating in a hung jury.

In addition, there are circumstances about the instant case which, while they in no manner affect the legal issue, make this a most appropriate one with which to resolve the question of finality. Denial of certiorari by this Court in *Gilmore* v. *United States* exposed that defendant to a two or three-day trial involving four or five witnesses in the community in which he resided after a first trial attended by little or no publicity. Denial of the writ in this case will subject these defendants to a trial which, if the first trial is any guide, will consume at least three months. Moreover, this second trial will be held in a city twelve

hundred miles from the homes of these petitioners and from the homes of most key prosecution and defense witnesses. This second trial will be held less than four months after a greatly publicized first trial, at the conclusion of which each of the local newspapers featured interviews with individual jurors in which these jurors stated the various factors which prompted them to vote one way or the other.

Rule 29 (a) of the Federal Rules of Criminal Procedure places on the trial judge a duty to enter a judgment of acquittal in any criminal case where the Government's evidence is insufficient to sustain a conviction of the offense with which the defendant is charged. No discretion resides in the trial judge in this regard; he has no power to order a new trial in such a situation. This is because Rule 29 (a) provides that he "shall" acquit the defendants, and "when used in the Federal Rules of Criminal Procedure the word 'shall' is mandatory." *United States* v. *Warrington*, 17 F.R.D. 25, 28.

> "The terms of Rule 29 (a) are mandatory * * *." *United States* v. *Swidler*, 207 F. 2d 47 (C.A. 3 1953), cert. den. 346 U.S. 919 (1953).

Therefore, if at the close of all the evidence in the trial of this case there was not sufficient evidence to sustain petitioners' conviction, there was vested in each of them an absolute right to an acquittal. Indeed, the Court of Appeals assumed *arguendo* that such was the case.

> "We may, however, assume *arguendo* that the evidence was not sufficient and that the Court should have entered the judgment of acquittal under Rule 29." *Gilmore* v. *United States*, 264

F. 2d 44, 45 (C.A. 5 1959), opinion adopted in *Mack v. United States, infra*, p. 4a.

This case then presents one facet of the problem arising when the trial court erroneously denies a motion for acquittal. Had the jury proceeded to acquit these petitioners, the trial court's error would, of course, have become moot. On the other hand, had the jury convicted the petitioners, they could have sought a judgment of acquittal on appeal. Moreover, even if in the interim between the erroneous denial of acquittal and the taking of an appeal, they had requested after verdict a new trial, the appellate court could still enter an acquittal on appeal, although it would then also have the option to grant the request for a new trial. *Bryan v. United States*, 338 U.S. 552 (1950); see also *Sapir v. United States*, 348 U.S. 373 (1955) (concurring opinion). This case then presents the last legal problem connected with erroneous denial of an acquittal where insufficient evidence was presented by the Government: what becomes of an accused's vested right to acquittal in the event the jury cannot agree on a verdict? Petitioners submit that the concept of finality is broad enough to permit appellate review of such an important right. The Court of Appeals, however, has accepted the Government's position that this vested right to an acquittal evaporates because of the jury disagreement.

If the Court of Appeals is correct in its position that the doctrine of finality can operate to divest an accused of the most important right that he can possibly have, the right to an acquittal, then a most paradoxical situation will result in every criminal trial where the court erroneously submits the case to the jury. An accused will be in a far better position

if the jury then convicts him than he would be in if no verdict whatsoever was reached. If he is convicted, an appellate court can enter an acquittal on appeal. However, if one or more jurors *vote* to acquit him, his right to an acquittal as a matter of law is destroyed.

Furthermore, the necessary implication of the decision below is that should the second trial likewise end in jury disagreement, a third (and perhaps a fourth) trial could follow. If the jury's disagreement is allowed to operate to bar finality, petitioners know of no legal principle which would prevent a whole series of trials.

Finally, one is led to ask the question left unanswered by the Court of Appeals and by the Fifth Circuit in the *Gilmore* case: what becomes of the error in not entering a judgment of acquittal—an error which each of these courts assumed *arguendo* had occurred in the respective trials? Can the error be raised should conviction follow retrial, even though the evidence at the second trial *is* sufficient to take the case to the jury? Or does the error somehow vanish and become moot? Perhaps nothing so points up the need for a decision by this Court on the question of the finality of such a ruling as the fact that the Government itself cannot make up its mind on this matter. In its brief in opposition to the granting of certiorari in *Gilmore* v. *United States*, No. 683 Misc., October Term, 1958, pp. 5-6, the Solicitor General took the position that a defendant convicted at the second trial could then appeal from the order denying his acquittal at the close of the first trial:

> "Thus, petitioner's contention that he was entitled to a judgment of acquittal after the first trial may be raised and fully reviewed on appeal

after a possible final judgment against him on retrial."

However, in the motion to dismiss the instant appeals, Government counsel in effect repudiated this viewpoint and argued in its place that the error of the trial court would become moot. At page 2 of their "Motion to Docket and Dismiss Appeal," they stated:

> "The law appears to be settled that, under the circumstances of this case, the orders appealed from * * * have become moot as a result of the mistrial * * *."

The above considerations would at the very least cause one to hesitate long before he says that petitioners' appeals were properly dismissed by the court below. Individually and collectively, these considerations are indications that the Court of Appeals has taken a most mechanistic view of the concept of finality and has ignored the instruction of this Court that:

> "[F]inality * * *, is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system." *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940).

While it is true that this Court has never passed upon the finality of an order such as that involved in this case, it is impossible to reconcile the action of the Court of Appeals in this case with this Court's decision in *Stack* v. *Boyle*, 342 U.S. 1 (1951). In that case this Court acknowledged the immediate appealability of an order of a trial court fixing what the defendant deemed to be an excessive amount as bail. That decision is important in connection with this

case for at least two reasons. First of all, the ruling in *Stack* v. *Boyle* destroys the Government's major argument against the appealability of the order denying the motion for judgment of acquittal. In support of its contention that such order lacks finality, the Government has placed major reliance on the following statement in *Berman* v. *United States*, 302 U.S. 211, 212-13 (1937):

> "Final judgment in a criminal case means sentence. The sentence is the judgment. * * * To create finality it was necessary that (defendant's) conviction should be followed by sentence * * *."

The Government maintains that this statement means that unless a defendant has been sentenced, he cannot appeal. This very reading of *Berman* was discredited in the *Stack* case. Justice Jackson in his concurring opinion noted that the term "final decision" in Section 1291 is broader in its meaning than the language in the *Berman* case which speaks of "final judgment." He then set forth the actual holding in and the limits of the *Berman* decision as follows:

> "While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Id.* at 12. (Concurring opinion)

Not only does the decision in *Stack* v. *Boyle* expose the fallacy of the Government's argument that only a defendant who has been sentenced can take an appeal under Section 1291, but the implications of that decision dictate the finality of the order in the instant case. This Court recognized that the constitutional right to bail was of such a nature that unless an appeal could be taken immediately from its denial, the

right would lose much of its utility to the defendant in a criminal case. It would be idle to review after the trial the question of whether the defendant should have been free on bail during the trial.

> "[U]nless it can be reviewed before sentence, it can never be reviewed at all." *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951). (Concurring opinion)

This fact, more than any other, moved this Court to accord to any decision denying reasonable bail the attribute of finality.

> "[P]rocedural rights so vital cannot be without means of vindication." *Stack* v. *Boyle*, 342 U.S. 1, 10 (1951). (Concurring opinion)

The decision in *Stack* v. *Boyle* did not involve any retreat from the doctrine of finality. This Court has always recognized that the concept of finality is a flexible one.

> "[F]inality * * * is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system." *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940).

By the same token, the right which the petitioners seek to vindicate by this appeal is far too important to be sacrificed to any rigid and doctrinaire interpretation of finality. If, as the court below assumed *arguendo*, the Government had failed at the end of the trial of this case to present sufficient evidence to sustain a guilty verdict, the petitioners had a right under the terms of Rule 29 (a) of the Federal Rules of Criminal Procedure to stand acquitted. This is not simply a procedural right. Rule 29(a) is an implementation of the constitutional right of an

accused not to be twice placed in jeopardy for the same offense. It would be unconstitutional for the trial court to permit a second trial in a case where the Government's evidence at the first trial was not sufficient to go to the jury.

> "To agree * * * that the prosecution is entitled to a new trial as a matter of right, after the issues have been fully tried in a trial by judge and jury and after the Government has failed to prove its case against the defendants, is a monstrous penalty to impose upon the defendants. * * * The creation of such a right in this case would come very close to violating the ancient doctrine codified in our Constitution that the accused shall not twice be put in jeopardy of life or limb for the same offense." *Ex parte United States*, 101 F. 2d 870, 878 (C.A. 7 1939).

This right to be free from a second jeopardy involves much more than a mere right to be free from repeated punishment. Involved also in this constitutional guarantee is the right to be free from "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity * * *." *Green* v. *United States*, 355 U.S. 184, 187-88 (1957). This right to be free from repeated trials is one of those few constitutional rights which loses all meaning unless the denial of that right is immediately reviewable. Just as it would be a mockery of the Constitution to review after trial the right of a defendant to be free on bail during the trial, so also it would involve a sacrifice of a most important constitutional right to hold that the right to be free from the harassment of repeated trials can only be reviewed

after the repeated trials have taken place. A long line of decisions by this Court has recognized that the doctrine of finality will never be used to defeat substantial rights. On the contrary, the jurisdiction of the trial court may be suspended by an appeal whenever "not to allow this interruption would forever preclude the review of the [] claim [] *Cobbledick v. United States*, 309 U.S. 323, 328 (1940). An order is final whenever denial of an appeal would leave the injured party "powerless to avert the mischief of the order [] []." *Perlman v. United States*, 247 U.S. 7, 13 (1918). In *Cobbledick v. United States*, 309 U.S. 323, 328-9 (1940), this Court summed up the holding in the *Perlman* case thus:

> "To have denied him opportunity for review [] on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying [] [] any appellate review of his constitutional claim."

This Court has held in *Swift and Co. Packers v. Compania Colombiana De Caribe*, 339 U.S. 684, 689 (1950), that:

> "The provision for appeals only from 'final' decisions in 28 U.S.C. 1291 should not be construed so as to deny review of a claim fairly severable from the context of a larger litigious process."

The Court of Appeals attempted to distinguish *Stack v. Boyle* on the ground that "the question of bail and the proceedings in respect to it are not part of the trial, a unitary proceeding of which the final decision is a judgment, but are separate and independent from the questions and the proceedings of the trial." This distinction is not persuasive.

There is no question more separated from the issues raised in a retrial of this case than the question of whether the evidence at the first trial was insufficient to take the case to the jury. To be sure, the question of the sufficiency of the Government's evidence will arise at the conclusion of any retrial. However, the question of whether the Government presented sufficient evidence at the first trial to take the case to the jury, or whether, on the other hand, these petitioners should have been acquitted at the conclusion of that first trial is a question which cannot possibly arise during the second trial. Such a question is so separated from the stream of any later trial that it may be reviewed as a final decision. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *United States v. Ciavarelli*, 202 F. 2d 13, 16 (C.A.D.C. 1952).

The Court of Appeals indicated, and petitioners agree, that one of the many factors to be weighed in determining whether a ruling of a trial court has finality is the extent to which review of such a ruling would increase the workload of the appellate courts. Petitioners recognize that a motion for an acquittal is made at the close of the evidence in virtually every case. Furthermore, they realize that if the denial of such a motion in a case where the jury cannot reach an agreement is deemed a "final decision," the appellate courts would be faced with review of the denial in all criminal cases terminating in a hung jury. Such a result, however, would not materially increase the workload of the appellate courts for two reasons. First of all, it appears the incidence of jury disagreement in federal criminal cases is very small. In the three-year period beginning July 1

1956, and ending June 30, 1959, some 1,458 criminal cases went to trial in the United States District Court for the District of Columbia. Only 16 of these cases, slightly over 1 percent of the total number tried, ended in a hung jury. Secondly, as a practical matter, no double review of such criminal cases would result even in the event the appellate court should decide that the evidence at the first trial was sufficient to sustain a guilty verdict. If a defendant should then be convicted at the second trial, and should seek to raise again at the appellate level the insufficiency of the Government's evidence, the burden obviously would be upon him after the retrial to point out to the court wherein the Government's proof was in any manner different from that presented at the first trial. The court would then simply evaluate the impact of any diminution in the Government's case upon its earlier ruling that the evidence was sufficient to take the case to the jury. Such a course would seldom, if ever, impose any burden on the appellate tribunal.

The order denying the judgment of acquittal was literally "final" in these five respects. (1) It was the *final* act of the trial court in this case; its order was entered several days after the jury was discharged. (2) The ruling was the *final* decision that any trial court will ever render on the basis of the evidence presented at the trial just completed. (3) The record of the first trial is completely severable from the record of any new trial, since the Government must begin anew before a new jury in a new trial. (4) The trial judge had a mandatory duty to see to it that an *end* be brought to efforts to convict petitioners, since the Government had failed to adduce sufficient evidence to sustain conviction. (5) Had

this duty been carried out, there would in fact have been an *end* to the attempt to convict the petitioners.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit and, upon review, the judgments should be reversed and the case remanded to that court for reinstatement of petitioners' appeals and for decision on the merits.

Respectfully submitted

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APPENDIX

APPENDIX A

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 29 of the Federal Rules of Criminal Procedure:

"Rule 29. Motion for Acquittal.

"(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

"(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted

to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal."

* * * * *

Section 1291 of Title 28 of the United States Code:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15322

RICHARD A. MACK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 15323

THURMAN A. WHITESIDE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

MEMORANDUM TO ACCOMPANY ORDER DOCKETING
AND DISMISSING APPEALS

Filed September 29, 1959

Before PRETTYMAN, Chief Judge, and EDGERTON and WILBUR K. MILLER, Circuit Judges.

PER CURIAM: These are motions to docket and dismiss, filed by the Government. The cases were tried to a jury, motions for judgments of acquittal were made, the judge reserved decision, the jury disagreed and was discharged, and the judge thereafter denied the motions. The defendants appealed from the denials.

The Court of Appeals for the Fifth Circuit, in *Gilmore v. United States*,[1] considered and disposed of most of the points raised here by the appellants. We agree with the opinion in that case and adopt it here.[2]

Another point raised by appellants concerns the applicability of *Stack* v. *Boyle*.[3] That case involved a motion to reduce bail pending trial. The Court held denial of the motion to be a final decision within the statute governing the right to appeal.[4] The considerations applicable to such a motion concerning bail, which led to the conclusion of the Court, are inapplicable here. The rights to bail and to freedom from excessive bail are obviously different from whatever rights a defendant may have to a judgment of acquittal after the evidence is in upon a trial by jury. Moreover the question of bail and the proceedings in respect to it are not part of the trial, a unitary proceeding of which the final decision is a judgment,[5] but are separate and independent from the questions and the proceedings of the trial. The difference between the questions is made amply clear by the opinions of the Justices in *Stack* v. *Boyle*, *supra*.

Appellants would have us read Rule 29(b) of the Federal Rules of Criminal Procedure as denying to a trial court the power to order a new trial where the judge reserves decision on a motion for judgment of acquittal, the jury thereafter disagrees, and the court then denies the motion. The last sentence of the Rule is: "If no verdict is returned the court may order a new

[1] 264 F. 2d 44, *cert. denied*, 359 U.S. 994 (1959).

[2] See also United States v. Swidler, 207 F. 2d 47 (3d Cir.), *cert. denied*, 346 U.S. 915 (1953).

[3] 342 U.S. 1 (1951).

[4] 28 U.S.C. § 1291.

[5] See Berman v. United States, 302 U.S. 211, 212-213 (1937); Parr v. United States, 351 U.S. 513 (1956).

trial or enter judgment of acquittal." We read that sentence as it is written. It is not limited to a situation wherein the court has denied, rather than reserved decision on, the motion before submitting the case to the jury.

To read Rule 29(b) as appellants would have us read it would make a mistrial due to a disagreement of the jury, where the judge has reserved decision upon a motion for acquittal, equivalent to an acquittal. We think the Rule was not so intended and cannot be so read.[6]

Appellants urge the burden of a retrial as a determinative factor. But many rulings of a trial judge during the course of a trial result in similar burdens. Appellate courts are bound by the rule of finality.[7] We think the denials of the motions for judgments of acquittal were not final decisions within the meaning of the statute.

Appeals dismissed.

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[6] *Cf.* Bryan v. United States, 338 U.S. 552 (1950).

[7] *Supra* note 4.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 507

RICHARD A. MACK AND THURMAN A. WHITESIDE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* memorandum of the court of appeals (Pet. App. 3a–5a) is not yet reported.

JURISDICTION

The order docketing and dismissing the appeals was entered on September 29, 1959. A petition for rehearing *en banc* was denied on October 22, 1959. The petition for a writ of certiorari was filed on October 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial of a motion for judgment of acquittal after a mistrial is appealable.

STATUTE AND RULE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 29 of the Federal Rules of Criminal Procedure provides:

> (a) Motion for Judgment of Acquittal.
>
> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> (b) Reservation of Decision on Motion.
>
> If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion

is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

STATEMENT

Petitioners were tried upon an indictment charging a violation of 18 U.S.C. 1505 (Influencing or Injuring Witness Before Agencies and Committees) and 18 U.S.C. 371 (Conspiracy) (see Prelim. Supp. Orig. Rec. 4–16).[1] At the close of all the evidence each petitioner moved for judgment of acquittal (Tr. Vol. 52, pp. 6300, 6307). The trial judge reserved decision pursuant to Rule 29 of the Federal Rules of Criminal Procedure, and submitted the case to the jury (Tr. 6330). When the jury was unable to agree on a verdict the court declared a mistrial and set the case for reassignment (Prelim. Supp. Orig. Rec. 3). The court thereafter entered an order denying the motions for judgment of acquittal (Prelim. Supp. Orig. Rec. 2).

[1] There has been filed with the Clerk a copy of the transcript, which will be referred to as "Tr.". All the original district court pleadings and orders are separately bound in two volumes entitled "Original Record on Appeal," and are supplemented by a certified volume entitled "Preliminary Supplemental Original Record on Appeal." Also filed and certified are two separately paginated volumes containing only those items designated by petitioners Mack and Whiteside, respectively. The Mack designation will be referred to as "M." and the Whiteside designation as "W.".

Petitioners filed notices of appeal from this order. The government moved to docket and to dismiss, on the ground that the order was not appealable (M. 1–4, W. 1–4). The court of appeals, in a *per curiam* memorandum, dismissed the appeals (M. 38–41, W. 48–51).[2] It held (Pet. App. 5a) that "the denials of the motions for judgments of acquittal were not final decisions within the meaning of the statute [28 U.S.C. 1291]" governing criminal appeals. The court stated (Pet. App. 4a) that it "agree[d] with * * * and adopt[ed]" the opinion of the Court of Appeals for the Fifth Circuit in *Gilmore* v. *United States,* 264 F. 2d 44, certiorari denied, 359 U.S. 994, rehearing denied, 360 U.S. 914 (M. 40, W. 50). The court below unanimously denied rehearing *en banc* (M. 62, W. 72).

ARGUMENT

Petitioners present only the narrow question whether an order denying a motion for judgment of acquittal, entered after the jury has failed to agree, is appealable. This precise issue was, as petitioners recognize (Pet. 4), decided adversely to their contention in *Gilmore* v. *United States,* 264 F. 2d 44 (C.A. 5), in which this Court recently denied certiorari. 359 U.S. 994. The court below in the instant case "agree[d] with * * * and adopt[ed]" (Pet. App. 4a) the opinion in the *Gilmore* case, and there is no greater reason for further review here

[2] The court below also dismissed appeals from another order which denied motions for acquittal based on different grounds. No review is sought of that ruling.

than in *Gilmore*.[3] See, also, *United States* v. *Swidler*, 207 F. 2d 47 (C.A. 3), certiorari denied, 346 U.S. 915, where the Third Circuit, sitting *en banc*, held that an order of the trial court, entered after a guilty verdict, which denied a motion for acquittal but granted a new trial, was not appealable. The court there assumed *arguendo* that the evidence was insufficient to prove guilt and that an acquittal should have been directed, but nevertheless concluded that the order denying the acquittal was not "a final reviewable decision" (p. 48).

An order denying a motion for acquittal is not a reviewable "final decision" because "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U.S. 211, 212. For unless a defendant has been convicted and sentenced, the denial of an acquittal is merely an interlocutory step in the proceedings. As in the case of other interlocutory orders, it may be challenged only on appeal from the "final decision," that is, on appeal from any conviction and sentence. Cf. *Parr* v. *United States*, 351 U.S. 513, where this Court held that dismissal of an indictment in one district,

---

[3] Petitioners' argument (Pet. 4–5) that a retrial in the instant case will subject them to a greater burden than was imposed by the retrial in *Gilmore* (because of the greater length of the trial and the defendants' distance from their homes) is beside the point. For the rationale of *Gilmore*—and of the decision below—is that an order denying acquittal is not appealable because it is not a "final decision"; and the extent of the burden which a retrial might impose upon a defendant cannot change the finality of the order.

after the Government had obtained a new indictment in another district for the same offense, was not appealable, since it was merely an interlocutory step in the criminal case.[4]

The *Parr* case also answers petitioners' contention (Pet. 8–13) that denial of a motion for judgment of acquittal is so severable from the main controversy as to be reviewable under the rule of such cases as *Stack* v. *Boyle*, 342 U.S. 1. This Court pointed out in *Parr* (351 U.S. at 519) that in such cases "orders made during the course of a litigation were held appealable because they related to matters outside the stream of the main action and would not be subject to effective review as part of the final judgment in the action. Unlike the orders in those cases, this order was but a 'step toward final disposition of the merits of the case' and will 'be merged in the final judgment'". Similarly, in the instant case the denial of acquittal was but a "step toward final disposition of the merits of the case." Petitioners have already filed a claim of double jeopardy in connection with the retrial, and if that claim is rejected, its validity may be tested on appeal from any final judg-

[4] Indeed, this is an even stronger case than *Parr* for holding the interlocutory order not separately reviewable. For in *Parr* the challenged indictment was dismissed, and the defendant was reindicted in another district. In the instant case, however, the retrial will be on the same indictment and in the same district.

ment of conviction and sentence entered against them.[5]

Petitioners argue (Pet. 10–11), however, that if they were entitled to a judgment of acquittal in the first case, their subsequent retrial would itself violate their constitutional protection against double jeopardy. But the fact that a constitutional right is claimed does not make a non-final order final. Constitutional rights may be involved in a ruling on a motion to suppress evidence, but this Court has expressly held that such rulings are not appealable before final judgment. *Cogen* v. *United States*, 278 U.S. 221; *Cobbledick* v. *United States*, 309 U.S. 323, 325–326; *Carroll* v. *United States*, 354 U.S. 394, 404.

As we pointed out in our brief in opposition in the *Gilmore* case (No. 683 Misc., Oct. Term. 1958), permitting immediate review of orders denying motions for acquittal would lead to serious and unwarranted

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[5] Petitioners suggest (Pet. 7–8) that although the Government stated in its brief in opposition in *Gilmore* that the denial of acquittal in the first trial could be litigated on appeal from conviction in the second trial, it took a contrary position in the instant case in the court of appeals because it stated that the order of acquittal had become moot as a result of the mistrial. But the mootness contention was made only with respect to the appealability of the order denying the motion for acquittal. We do not deny that, if petitioners are convicted and sentenced at the retrial, they may on appeal therefrom have review of any claim of double jeopardy.

delay in the conduct of criminal proceedings. For under such a rule, whenever the jury disagreed, a defendant who made a timely motion for acquittal could obtain an immediate review of the sufficiency of the evidence that had been offered against him, even though he had not been convicted and sentenced, and even though, upon the retrial, he might be acquitted. Such a procedure would be contrary to "the long-standing statutory policy against piecemeal appeals" (*Parr* v. *United States, supra*, 351 U.S. at 519). Indeed, in this very case, petitioners' attempt to obtain review of the interlocutory denial of acquittal has resulted in delay in the retrial. On November 12, 1959, the trial date previously set, the district court postponed the trial until this petition has been determined.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959

No. 507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

RICHARD A. MACK AND THURMAN A. WHITESIDE,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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---

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

By way of reply to the brief of the United States in opposition to their petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, the petitioners respectfully state to the Court as follows:

I.

After pointing out, quite correctly, that the instant petition raises the "precise issue" involved in *Gilmore* v. *United States*, 264 F. 2d 44 (C.A. 5 1959), cert. den. 359 U.S. 994 (1959), the Government contends that "there is no greater reason for further review here than in *Gilmore*." (Br. 4-5) Such a statement overlooks the fact that in that case, counsel for the defendant never cited, either in his brief to the Fifth Circuit or in his petition for certiorari, the case of *Stack* v. *Boyle*, 342 U.S. 1 (1951), which is the keystone of the argument in the present petition. Nor was the *Stack* case cited or discussed in the opinion of the Fifth Circuit.

This failure on the part of the Government to perceive the essential difference in theory between the petition in *Gilmore* and that in the present case has led it to misunderstand completely petitioners' position. Thus the Government states:

> "But the fact that a constitutional right is claimed does not make a non-final order final." (Br. 7)

This language appears word for word in the Government's Brief in Opposition filed in the *Gilmore* case. However appropriate the statement may have been in response to that petition, it utterly misses the point of the present one.

Petitioners do not contend that any time a trial court makes a ruling which, if erroneous, would constitute a denial of a constitutional right, that ruling is transmuted into a "final decision" and may be immediately appealed. They do not question the Govern-

ment's argument that "the fact that a constitutional right is claimed does not make a non-final order final." It is only when the constitutional right claimed is of such a nature that it "would not be subject to effective review as part of the final judgment in the action" that an appeal may be taken. *Parr* v. *United States*, 351 U.S. 513, 519 (1956). In *Stack* v. *Boyle*, 342 U.S. 1 (1951), this Court held that the erroneous denial of bail was a "final decision" because the constitutional right to bail by its very nature is substantially useless unless erroneous denial of it can immediately be reviewed by an appellate court. By the same token, petitioners now argue that their constitutional right to be free from the harassment of repeated trials is of such a nature that it must be given immediate review when it is erroneously denied. The concept of finality must never be used to emasculate a constitutional right. In *Stack* v. *Boyle*, *supra*, this Court rejected a reading of finality which would have eviscerated the constitutional right to bail. Petitioners now ask this Court to reject an interpretation of finality which strips the constitutional right to be free from repeated trials of much, if not all, of its meaning.

II.

In the Court of Appeals petitioners sought the opportunity to demonstrate that at the close of all the evidence in the first trial, they were entitled to stand acquitted on the ground that the prosecution had not adduced sufficient evidence to sustain a guilty verdict. The Government now concedes that if petitioners are correct in this claim, another trial would violate the double jeopardy provision of the Constitution. At the same time, however, the Government

takes the position that the doctrine of finality prevents any review of this claim prior to a conviction. (Br. 7 n. 5) It, therefore, now repudiates its contention, made below, that the error will never be reviewable.

Perhaps nothing so points up the suspect nature of this contention as a consideration of the alternative which the Government puts forward to present appellate review. Petitioners are told to follow this course: (1) plead double jeopardy at the start of the second trial; (2) if the trial judge overrules the plea, endure the strain and expense of a second trial; (3) if convicted, designate for appeal the first trial record as well as that of the second; and (4) demand that the appellate court review the sufficiency of the evidence at the first trial as a prelude to any consideration of the second trial.

This labyrinthine procedure is at once cumbersome and wasteful. It is cumbersome because in all cases where the first trial terminates in a hung jury, the judge who is to preside at the second trial must at the outset review all the evidence at the first trial so he can equip himself to pass knowledgeably on the double jeopardy plea. Moreover, in all cases where the plea is overruled, and a conviction follows, the appellate court must review the records of two, and perhaps more, trials. The Government's theory is wasteful because in those cases where an appellate court finds that the first-trial evidence was deficient, the second trial automatically becomes meaningless.

Perhaps the best way to illustrate that such a course of proceeding is nonsensical is to consider what it would call for in the context of the present case. The retrial has been assigned to a judge who until now

has had no contact with this case. According to the Government, when petitioners plead double jeopardy at the beginning of the second trial, this judge cannot enter upon the trial until he first studies the seven thousand pages of testimony and the hundred-odd documentary exhibits accumulated during the three-month first trial. Moreover, in the event petitioners' plea is overruled and a jury then returns a guilty verdict, the Court of Appeals for the District of Columbia Circuit faces the same monumental task before it can even proceed to a consideration of the second trial record.

In contrast to this weird procedure, one must concede the sense, the soundness, the practical advantage, of petitioners' position that the order is presently appealable. Since under this view the order denying judgment of acquittal would be final and appealable, a "failure to appeal therefrom forfeits [the] right of review." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 516 (1950). Therefore, a defendant who does not appeal at once from such an order will waive the right to do so should he be convicted at a subsequent trial. Under the view of finality urged by petitioners, the ghosts of a past trial cannot haunt a later appeal. Nor would such subsequent trial ever be reduced to a study in futility and waste by a belated appellate decision that an acquittal should have been entered at the end of the first trial.

III.

The Government suggests at page 8 of its brief that the position of petitioners will lead to delay of a second trial. This argument comes very close to begging the question. The purpose of petitioners in seeking review

of the order denying their motion for judgment of acquittal is not to delay the second trial, but to prevent it altogether. It is true that if the appellate court rejects petitioners' contention that there was insufficient evidence to warrant a guilty verdict, a retrial will result. However, an appeal would not necessarily delay that second trial. It would be a simple matter for the lower appellate court to amend its rules to provide for an advanced hearing of those relatively few criminal trials ending in a hung jury. It is interesting to note that provision for summary hearing of appeals from denials of bail was provided for by appellate courts in the aftermath of this Court's decision in *Stack* v. *Boyle*, 342 U.S. 1 (1951). See, e.g., Rule 33(c) of the United States Court of Appeals for the District of Columbia Circuit.

IV.

Rule 29(b) gives the trial judge an option when the defendant makes a motion for judgment of acquittal at the conclusion of all the evidence. The court may decide the motion before the case is submitted to the jury, or he may reserve his decision on the motion. In the case at bar, the trial judge reserved decision on this motion. As a matter of fact, the trial judge had the motion under advisement for almost three weeks. This hesitancy on the part of the trial judge coupled with the deadlocking of the jury is a strong indication that there is some inherent deficiency in the Government's case. An order rendered under such

circumstances of doubt certainly should be deemed final enough for an appeal. This case then presents to the Court its first opportunity to delineate the relationship between the reservation of decision under Rule 29(b) and the concept of finality.

Respectfully submitted.

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IN THE

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of December 7, 1959, denying the Petition for Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case as prayed for in the petition filed October 30, 1959, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The issue which petitioners request this Court to review is whether the denial of a motion for judgment of acquittal is appealable as a final decision where the evidence at the first trial was not sufficient to sustain a

guilty verdict, and the jury was discharged without reaching any verdict.

In their Petition for Writ of Certiorari, petitioners predicted at page 4 that "it will be only a matter of time until this same question is presented to the other courts of appeals, because this question of finality arises in virtually every criminal case eventuating in a hung jury." Two days after this Court denied the instant petition for certiorari, there was filed with the Court the case of *Shavin* v. *United States of America*, Dkt. No. 577. Petitioner in that case seeks a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and his petition presents to this Court the precise question involved in petitioners' case.

The question of whether the deadlocking of the jury deprives a defendant of the right to an immediate appeal from an erroneous denial of his motion for a judgment of acquittal based upon the insufficiency of the Government's evidence had never arisen in any appellate court prior to this year. However, in the course of this year, the question has arisen in three different courts of appeal, and in each case a petition for a writ of certiorari has been lodged with this Court. Therefore, it seems that this is a question of law which literally cries out for decision by the Supreme Court.

In view of the recently filed petition for writ of certiorari in the *Shavin* case, petitioners respectfully request that this Court reconsider and thereupon grant their petition, and that the *Shavin* case and the instant case be consolidated for argument and decision.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

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